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In The

Supreme Court of the United States

October Term, 1998

AMOCO PRODUCTION COMPANY, on behalf of itself and the class it represents,

Petitioners,

vs.

SOUTHERN UTE INDIAN TRIBE,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF OF *AMICI CURIAE* THE COAL BED METHANE AD HOC COMMITTEE, THE WYOMING INDEPENDENT PRODUCERS' ASSOCIATION AND THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Coal Bed Methane Ad Hoc Committee ("the Committee"), the Wyoming Independent Producers' Association ("WIPA"), and the Independent Petroleum Association of America ("IPAA") file this brief *amici curiae* in support of petitioner Amoco Production Company ("Amoco").[1]

The Committee is comprised of Wyoming landowners and oil and gas companies, supported by other landowners, a local bank, and a pipeline company. All are directly interested in the development of the coal bed methane resources in the Powder River Basin in northern Wyoming. The landowners hold patents, subject to the reservation of "coal" under 30 U.S.C. §§ 81-85, issued by the Department of the Interior under various statutes disposing of the public lands to encourage the settlement and cultivation of our western States. The oil and gas companies, the bank, and the pipeline company all have interests and investments deriving from leases issued by the landowners and from allied projects to develop and transport the projected high volumes of coal bed methane production from the Powder River Basin.

WIPA and IPAA represent, on a state and national level respectively, thousands of independent producers of natural gas and oil on all issues affecting their members'

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[1] The parties have consented in writing to the filing of this brief. Their letters have been filed with the Clerk of the Court. Counsel for the parties did not write any part of this brief; the undersigned counsel is its sole author. Persons other than the *amici curiae* or their members who made a monetary contribution to the preparation of the brief are listed in Appendix A at the end of this brief. The members of the Committee are also identified in Appendix A.

interests. The decision below has created a cloud over the title to coal bed methane in a vast area of the country. WIPA's and IPAA's members are vitally interested in resolving the doubts created by the decision below so that they may proceed with the development of potentially tens of trillions of cubic feet of coal bed methane resources.

BACKGROUND

To facilitate the development of this largely untapped resource, the United States Department of the Interior published a formal opinion in 1981, addressing the effect of the reservation of "coal" under the two statutes at issue here: an Act of March 3, 1909, 35 Stat. 844 ("the 1909 Act") and an Act of June 22, 1910, 36 Stat. 584 ("the 1910 Act"). After careful analysis, the Solicitor concluded that "coalbed gas was not reserved with federal coal in . . . patents issued subject to the 1909 and 1910 Acts." (Pet. App. 150a.)

The Southern Ute Tribe challenged this interpretation in the present case. In the district court, Judge Babcock granted summary judgment for Amoco and the defendant class, giving deference to the Solicitor's opinion. On appeal the Tenth Circuit reversed.

As it should, the Tenth Circuit acknowledged that the task before it was one of effecting "the will of Congress. . . . " (Pet. App. 10a, quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982)). The court of appeals found Congress' intent "ambiguous" as to whether coal bed methane was included in the reservation of "coal" in the 1909 and 1910 Acts. (Pet. App. 8a-9a.) The court admitted "Congress' awareness [in 1909] that CBM [coal bed methane] was released as a hazardous

byproduct of coal mining" (Pet. App. 20a) and the "fact that CBM could not be commercially extracted from coal in 1909. . . . " (Pet. App. 21a.) The court even quoted with approval the observation of the Pennsylvania Supreme Court that, despite their proximity in coal seams, "[c]oal and coalbed gas are, nevertheless, separate physical entities." (Pet. App. 22a.)

Noting that Congress did not expressly mention coal bed methane in the 1909 and 1910 Acts, the Tenth Circuit invoked the interpretive guideline that "land grants are construed favorably to the Government" and "that nothing passes except what is conveyed in clear language. . . . " (Pet. App. 11a quoting *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 59 (1983)). Placing the "burden" upon Amoco "to dispel any ambiguity in the construction of the coal reservation" (*id.*), the court found no clear language conveying the coal bed methane to the patentees. "Rather," the court concluded, "where the commercial value of CBM was unappreciated at the time of the enactment, the texts of these acts gives us no particular indication" of Congress' intent (Pet. App. 21a), and the coal bed methane was therefore not conveyed by the patents. (Pet. App. 32a.)

In the face of what the court of appeals regarded as so much uncertainty over congressional intent, the court was able to discern only one affirmative indication that Congress probably meant for the coal bed methane to belong to the owner of the reserved coal. It stated that the 1909 and 1910 Acts did not just reserve coal that could be, as of the date of enactment, mined economically. Instead, in the court's view, Congress reserved "all the coal." (Pet. App. 29a.) From this the court drew a sweeping inference.

> Congress knew there was indeterminate potential value in the reserved coal and intended to secure that value for the United States. Rather than indicating a limited reservation of coal to the United States, the legislative history suggests that Congress adopted an interpretation of coal which encompassed both the present and future economic value of coal for energy purposes, including value that could only be realized through advances in technology such as those which drive the present day exploration for CBM.

(Pet. App. 30a.)

SUMMARY OF ARGUMENT

The court of appeals' fundamental error was its mechanical application of the canon of construction resolving doubts over grants of federal lands in favor of the government, an approach already rejected by this Court in *Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979). Even if this were a case where Congress neither expressly included nor expressly excluded rights to minerals, the "essential" inquiry would be "whether the congressional will is otherwise made manifest" by other means, such as reading the statute "in the light of other statutes and a settled public policy in respect of mineral lands," *United States v. Sweet*, 245 U.S. 563, 567 (1918), or considering "the condition of the country when the act [was] passed," as well as its purpose and text viewed as a whole. *Winona & St. Peter RR Co. v. Barney*, 113 U.S. 618, 625 (1885).

Furthermore, the court of appeals disregarded a long line of this Court's cases construing statutes affecting the rights of homesteaders in their favor. Recognizing that

the "policy of the Federal Government in favor of settlers upon public lands has been liberal . . . ," *Clements v. Warner*, 65 U.S. 394, 397 (1860), this Court has held that, where a statute contained a limitation on or exception to the rights granted, "the liberal policy of Congress in favor of the actual settler *is better accomplished by a restrictive rather than extensive interpretation*" of the limitation or exception. *Id.* at 397-98 (emphasis added).

The history surrounding the enactment of the 1909 and 1910 Acts demonstrates that those receiving patents subject to their provisions received full title to the land save only for the one mineral the land was deemed "valuable for:" coal. 30 U.S.C. §§ 81, 83 & 85. All other minerals which, at the time the patent issued, the land was not thought "valuable for" passed to the patentee along with the rights to the surface. Indeed, even known deposits of coal continued to be patented without reservation where the deposits were not "valuable" enough.

Plainly, lands patented subject to these two Acts were not deemed valuable for coal bed methane. (Pet. App. 21a.) And Congress' decision to continue granting to patentees the rights to insufficiently valuable deposits of coal undermines the court of appeals' inference that Congress intended to preserve for the government the "future economic value" of coal to be later unlocked by "advances in technology. . . . " (Pet. App. at 30a.) On the contrary, it was precisely those values Congress intended to convey by patent. Settled public policy respecting mineral lands compels the construction, therefore, that Congress reserved only the solid rock coal itself; and patentees under these Acts were otherwise "entitled to a patent without reservation. . . . " 30 U.S.C. § 81.

Finally, there is no force behind respondents' contentions that the effects of extracting coal bed methane from coal militate against a finding that Congress severed the rights to the two resources. Congress in 1909 was aware of the difficulties of simultaneous development of coal estates that were separate from oil and gas estates, and those difficulties are no greater when the rights to coal bed methane are separate from the rights to the coal.

ARGUMENT

I. THE 1909 AND 1910 ACTS DID NOT ALTER SETTLED CONGRESSIONAL POLICY GRANTING TO PATENTEES THE RIGHTS TO ALL MINERALS EXCEPT THOSE CONSIDERED FORESEEABLY COMMERCIALLY VALUABLE AT THE TIME OF PATENTING.

To be sure, the 1909 and 1910 Acts neither employ the phrase "coal bed methane" nor define the term "coal." If they did, "it would be conclusive of the will of Congress upon the point." *United States v. Sweet*, 245 U.S. at 567. Of course, Congress does not need to define a term for its meaning to be plain, and we concur in and defer to Amoco's excellent presentation of Congress' intent in using the word "coal." Assuming one could find ambiguity in so familiar a word, however, we would appropriately resort "to the history of the times" when the statutes were passed, *Leo Sheep Co. v. United States*, 440 U.S. at 669, to discern the legislative intent.

From the Civil War to the turn of the twentieth century, the general policy of the United States was to encourage the settlement and improvement of the western states by granting patents – full fee simple title – to

persons developing the public lands for the various purposes specified by statute. These laws relied to some extent on the belief that lands could be classified by the use to which they could best be put. "Under the old system of land classification, the disposition of land owned by the United States depended upon whether it was classified as mineral land or nonmineral land, and title to the entire land was disposed of on the basis of the classification." *Watt v. Western Nuclear, Inc.*, 462 U.S. 36, 47 (1983) (explaining former land classification system).

The nonmineral land laws were not limited in scope to land completely free of minerals. On the contrary, they applied to lands not "known at the time of sale to be valuable" for minerals. *Deffeback v. Hawke*, 115 U.S. 392, 404 (1885). The fundamental precept was that what mattered was the value of land for minerals at the time it was disposed of.

> It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the preemption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

Id. at 404-05. Whether lands were valuable for minerals was to "be determined according to the facts in existence at the time" the patent issued, *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 328 (1887), for a "change in the conditions . . . whereby new discoveries are made . . . cannot affect the title as it passed. . . . " *Id.* And the

relevant facts at the time of patenting were those addressing whether the minerals "were in such quantity as to justify expenditures in the effort to extract them." *Deffeback v. Hawke*, 115 U.S. at 404.

By the turn of the century, therefore, it was well-known that the grant of full fee patents to entrymen, which included mineral rights that could prove valuable in the future, was the key to the national plan "to induce settlement, cultivation, and the establishment of homes upon the public lands." *Ware v. United States*, 154 F. 577, 584 (8th Cir. 1907). This Court had by then settled on a rule of construction highly solicitous of those entering the public lands for homesteading, recognizing that the "policy of the Federal Government in favor of settlers upon public lands has been liberal . . . ," *Clements v. Warner*, 65 U.S. 394, 397 (1860), and where a statute contained a limitation on or exception to the rights granted, that "the liberal policy of Congress in favor of the actual settler *is better accomplished by a restrictive rather than extensive interpretation*" of the limitation or exception. *Id.* at 397-98 (emphasis added).

This rule of construction was applied to protect settlers both from claims of others, *id.*; *Oregon & California RR Co. v. United States*, 189 U.S. 103 (1903), and from loss "through the mistake or neglect of the officers or agents of the Government." *Great Northern Ry. Co. v. Reed*, 270 U.S. 539, 546 (1926). In its most frequently quoted expression of the rule, this Court declared that "[t]he law deals tenderly with one who, in good faith, goes upon the public lands, with a view of making a home thereon." *Ard v. Brandon*, 156 U.S. 537, 543 (1895). The Court later reinforced its position: "With this declaration, in all its fulness, we heartily concur, and have no desire to limit it in

any respect. . . . " *Tarpey v. Madsen*, 178 U.S. 215, 220 (1900).

By the time Congress considered the 1909 and 1910 Acts, the accepted rule of construction was "that the statutes should not be construed strictly and harshly against the homesteader, but that the land laws should be administered liberally to fulfill their purpose," *United States v. Mills*, 190 F. 513, 521 (5th Cir. 1911), a rule of construction made particularly apt by Congress' decision to provide special homesteading rights to veterans of the Union army. *See generally Anderson v. Clune*, 269 U.S. 140 (1925) (discussing soldiers' additional homestead rights). *Accord Shiver v. United States*, 159 U.S. 491, 497-98 (1895) (contrary to the literal interpretation of the statutes, the Court holds that entrymen had a right to cut timber needed to establish a homestead). The rule of liberal construction also reflected that, like railroad land grants, homestead and desert-land patents were not gifts from the federal sovereign, but instead were the *quid pro quo* for years of labor and investment by entrymen. In other words, an entryman "*earned* the right to the lands described" in the patent. *Burke v. Southern Pacific RR Co.*, 234 U.S. 669, 680 (emphasis added).

It was against this backdrop that President Theodore Roosevelt approached problems his advisors perceived in the public land laws, especially as to coal lands. Under the Act of March 3, 1873, 17 Stat. 607, persons and associations could enter "vacant coal lands of the United States," subject to limitations on the acreage each could own, and obtain patents. 30 U.S.C. § 71. The restrictions on acreage led to controversies (and prosecutions) as developers attempted to assemble larger holdings for coal

mining. *See, e.g., United States v. Trinidad Coal & Coking Co.*, 137 U.S. 160 (1890).

Believing that the coal lands law and other public land laws inhibited the scientific management of vital resources such as water power, timber, forage, and minerals, President Roosevelt appointed a Public Lands Commission on October 22, 1903, to report on revisions. S. Hayes, CONSERVATION AND THE GOSPEL OF EFFICIENCY: THE PROGRESSIVE CONSERVATION MOVEMENT, 1890-1920 at 67 (1975). The Commission's first "partial report" issued in March 1904 alleging that "abuses" permeated the administration of the land laws and that the structure of the laws themselves often thwarted Congressional goals. S. Doc. No. 189, 58th Cong., 3d Sess. "Report of the Public Lands Commission" vi-vii & viii (1905) ("Commission Report"). Its second "partial report" in February 1905 urged that "the first essential for putting the remaining public lands to their best use is to ascertain what that best use is by a preliminary study and classification of them. . . . " Commission Report xiv.

Dissatisfied by congressional inaction on his Commission's report, President Roosevelt seized upon the allegations of fraud to further his agenda of more efficient use and federal management of the public lands. In a December 17, 1906, message to the Congress, Roosevelt explained that he had earlier that year directed the Secretary of the Interior "to allow no patent to be issued to public land under any law until by an examination on the ground actual compliance with that law has been found to exist." S. Doc. No. 141, 59th Cong., 2d Sess. 2 (1906) ("S. Doc. No. 141"). Also that year Roosevelt "withdrew approximately 64 million acres of lands thought to contain coal from all forms of entry. . . . " *Watt v. Western*

Nuclear, Inc., 462 U.S. 36, 48-49 (1983). The withdrawals were modified on the date of the President's message, *Conway v. Brooks*, 39 Pub. Lands Dec. 337, 339 (1910), to permit "agricultural entries . . . within a withdrawn area." *Instructions*, 40 Pub. Lands Dec. 418, 419 (1912). Entrymen received notice of the withdrawals by notations in the tract books of local land offices that the lands were "coal lands," *Instructions*, 35 Pub. Lands Dec. 681 (1907), pending final classification of the land by the USGS. *Nelson J. Littlejohn*, 44 Pub. Lands Dec. 48, 52 (1915).

Some entrymen, then, had entered before the withdrawals; others after. "In both instances, under the state of the laws then in force, the nonmineral claimant must have lost had the land ultimately been determined to be valuable for the coal deposits." *Instructions*, 40 Pub. Lands Dec. at 419. President Roosevelt had no intention, however, of making these lands available for patent under the coal land laws either.

> The present coal law limiting the individual entry to 160 acres puts a premium on fraud by making it impossible to develop certain types of coal fields and yet comply with the law. It is a scandal to maintain laws which sound well, but which make fraud the key without which great natural resources must remain closed. The law should give individuals and corporations under proper government regulation and control . . . the right to work bodies of coal land large enough for profitable development. My own belief is that there should be provision for leasing coal, oil, and gas rights under proper restrictions.

S. Doc. No. 141 at 2. Congress was not yet prepared, however, to abandon the policy of encouraging development by placing publicly-owned resources into private hands, and another fourteen years would pass before the Mineral Lands Leasing Act of 1920 would turn President Roosevelt's "own belief" into statutory form.

In the meantime, opposition to the land withdrawals grew as frustrated entrymen found their homestead and desert land entries in limbo. But the withdrawals continued. Between July 1909 and June 1911 an additional 57 million acres of potential coal lands were withdrawn pending classification. 31st Annual Report of the Director, USGS, to the Secretary of the Interior 46 (1910); 32nd Annual Report of the Director, USGS, to the Secretary of the Interior 65 (1911). Eventually withdrawals exceeded 140 million acres. President Roosevelt created within the USGS a Land Classification Board to, among other tasks, permanently classify lands chiefly valuable for coal. Because lands so classified could only be available under the coal land laws (which Roosevelt hoped to amend), the Board received numerous requests to "de-classify" withdrawn lands. 34th Annual Report of the Director, USGS, to the Secretary of the Interior 149 (1913) (236 requests between 1909-13).

His state severely affected by Roosevelt's initial withdrawals, *see* S. Rep. No. 61-703, at 2 (1910) (discussing coal lands in Wyoming), Representative Mondell of Wyoming secured a legislative compromise. In February 1909, the House Committee on the Public Lands reported out legislation giving persons whose patents had been withheld because of the Department's withdrawals the right to elect to receive a patent reserving to the United States "all coal" in lands "classified, claimed, or reported as being

valuable for coal. . . ." H.R. Rep. No. 60-2019 at 1 (1909). The report was critical of the Department's excessive withdrawals and the "unnecessary hardship and expense" they had caused entrymen. *Id.* at 3 & 4. On February 16, the bill was debated extensively on the floor of the House. The bill attracted colloquy on the reservation of the coal because "[i]t is the first legislation before Congress providing for a limited patent, or a patent reserving the mineral." 43 Cong. Rec. 2504 (1909) (remarks of Rep. Mondell).

> Mr. STEPHENS of Texas. Is it not a fact that valuable minerals are reserved now to the Government?
>
> Mr. MONDELL. No; that is not true. The patent having issued, the patent carries everything in the land with it, and the Supreme Court has decided in a number of cases that if the law be complied with in good faith and the entryman makes payment and final proof, thereafter the Government is barred from raising the question as to any mineral that may occur in the land.
>
> Mr. STEPHENS of Texas. That applies also to oil and coal?
>
> Mr. MONDELL. It applies to all kinds of minerals. In other words, the patents issued by the Government of the United States heretofore have been patents in fee.

Id. The debate disclosed that the Committee had considered and rejected the idea of reserving all minerals to the government. "We believe this is quite a sufficient departure from the past practice of the Government. The lands which this legislation will affect are lands which the department has claimed contain *some coals of value.*" *Id.* (remarks of Rep. Mondell) (emphasis added). The debate over the coal reservation concluded with Mr. Mondell's

hope that (as to future legislation) the reservation limited to coal "is as far as we will go in that direction [of mineral reservations]." *Id.*

As enacted, the bill offered a remedy for frustrated entrymen and others who had "in good faith located, selected, or entered under the nonmineral land laws"[2] lands "which subsequently are classified, claimed, or reported as being valuable for coal. . . . " 30 U.S.C. § 81. That remedy was in the form of an election. The person could avoid the expense and delay of a contest proceeding before the Department by agreeing to accept a patent which reserved to the United States "all coal in said lands, and the right to prospect for, mine, and remove the same."[3] *Id.* If he accepted the reservation, "no further inquiry [was] necessary respecting the coal character of the land." *Circular*, 38 Pub. Lands Dec. 183, 184 (1909). Alternatively, the person could contest "the character of the land located, selected, or entered by him . . . [as being] chiefly valuable for coal . . . ," and, if successful, was "entitled to a patent without reservation. . . . " *Id.* An unsuccessful contestant still was entitled to a patent, but subject to the reservation of coal. Some contested the

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[2] "The term 'selection,' as used in the land department, generally represents the filing or presentation of a claim by a State or a railroad company and is seldom used to indicate the claims of an individual, which is usually known as an 'entry' or a 'location,' as the case may be." *State of Utah*, 38 Pub. Lands Dec. 245, 247 (1909) (concerning state selection of lands under grant for public buildings).

[3] Anyone authorized to mine the federal coal could enter the land "upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction." 30 U.S.C. § 81.

withdrawals and classifications, *e.g. Ada I. Hindman*, 42 Pub. Lands Dec. 327 (1913); some did not.

The 1909 Act addressed the discrete problem of persons who had acted prior to President Roosevelt's campaign of withdrawals. But the withdrawals had not stanched the flow of immigration onto the public lands, and the next session of Congress faced the issue again. Newspaper reports alerted the House Committee on the Public Lands of areas "settled [since 1906] . . . by squatters who waited patiently for an opportunity to file" homestead entries. H.R. REP. NO. 61-703 at 4 (1910). Arguing that "large areas" of the withdrawn lands "are directly in the path of settlement and development," *id.* at 3, Representative Mondell and the committee urged enactment of a bill extending the same election to persons on lands entered or selected after the withdrawals had been effected.

A committee report explained the detailed criteria by which the Interior Department determined whether coal-bearing lands had deposits sufficiently valuable to warrant their treatment as "coal lands." H.R. REP. NO. 61-377 at 4 (1910). During floor debate, some representatives voiced concerns that the bill would allow coal not presently known to be valuable into private hands and that "we ought to wipe out all restrictions whatsoever, and make it [the reservation] apply to all coal wherever it exists. . . . " 45 CONG. REC. 6156 (1910) (remarks of Rep. Wilson). An amendment to that effect was offered by Representative Reeder of Kansas. *Id.* at 6160. Emotions on the floor ran high as western representatives fought to maintain the bill with few amendments. *See id.* (remarks of Rep. Mondell) (opposing the Reeder amendment as an idea "that has never before been favored by anyone"),

and *id.* at 6157 (remarks of Rep. Taylor) (opposing objections to the bill as "stupid, eastern, theoretical, so-called conservation ideas that prohibit growth and development"). Their efforts were successful, both generally and specifically as to the Reeder amendment. *Id.* at 6164.

As enacted, the 1910 bill permitted entry on lands withdrawn or classified as coal lands under "the homestead laws by actual settlers only, [and] the desert land law. . . . " 30 U.S.C. § 83. It also opened those lands to selection under the Carey Act, 43 U.S.C. § 641, and to withdrawal under the Reclamation Act of 1902, 32 Stat. 388. Those who qualified obtained title "with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same."[4] *Id.* Alternatively, the entryman retained the right "to present and have prompt consideration of applications" to enter lands which had been classified as coal lands "with a view of disproving such classification and securing a patent without reservation." 30 U.S.C. § 85.

The statutory trilogy respecting Roosevelt's withdrawals was completed in 1914 with the enactment of a bill directing the Secretary, with regard to withdrawn lands ultimately "classified as noncoal in character," to replace each limited patent issued under the 1909 and

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[4] The 1910 Act contained slightly more elaborate provisions governing mining activities on the patented land. The Act distinguished "prospecting" activities, for which the prospector would be liable merely for "all damages to the crops and improvements," from "mining and removal of the coal," for which the miner would be more broadly liable for "payment of the damages caused thereby to the owner [of the land]. . . . " 30 U.S.C. § 85.

1910 Acts with a coal reservation with "new or supplemental patents without such reservation." 30 U.S.C. § 82 (Act of April 14, 1914, 38 Stat. 335).

This history shows the error of the Tenth Circuit's mechanical use of the presumption construing land grants in favor of the government grantor. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 682-83 (1979) (harmonizing rules of interpreting public lands statutes). That presumption is simply one of many tools in divining congressional intent under the public land laws. And it has long been the rule that courts construing those laws must consider "the condition of the country when the acts were passed, as well as . . . the purpose declared on their face, and read all parts of them together." *Winona & St. Peter RR Co. v. Barney*, 113 U.S. 618, 625 (1885). In particular, courts are to take account of "settled public policy in respect of mineral lands." *United States v. Sweet*, 245 U.S. at 567. Over all these considerations, however, lies the policy that public land laws inducing private citizens and corporations to undertake work and investment on the "immense and undeveloped public domain" are to receive "a more liberal construction" than that suggested by the rule "that public grants are construed strictly against the grantees. . . . " *United States v. Denver & Rio Grande RR Co.*, 150 U.S. 1, 14 (1893).

Here the "condition of the country when the [1909 and 1910] acts were passed" was one in which the nation had not yet moved to a policy of reserving rights to all minerals for later leasing, as it later did in the Stock-Raising Homestead Act of 1916 ("SRHA"). *See Watt v. Western Nuclear, Inc.*, 462 U.S. at 37. The 1909 and 1910 Acts were the first *"limited"* step in that direction (Pet. App. 147a (House colloquy) (emphasis added)), with the

general rule remaining that all minerals the land was not "valuable for" were to pass to the patentee. The debate on the 1909 Act specifically acknowledged this Court's rulings holding that minerals of all types passed to the patentee unless the land was known to be valuable for a given mineral. 43 CONG. REC. 2504 (1909) (remarks of Rep. Mondell). And the Congress of 1909 and 1910 is fairly charged with the knowledge of this Court's rule of liberal construction of the homestead laws.

As the Tenth Circuit recognized, the coal bed methane is distinct from the coal, Congress was aware that it existed and posed a threat to safe coal mining, and in 1909-10 the methane was not forseeably producible. (Pet. App. 32a.) Therefore, the "more liberal construction" of intent compels the very opposite of the result the court of appeals reached applying, without further supporting analysis, the presumption against the grantee. In view of the rule of liberal construction and the settled policy of granting patentees the rights to minerals of only speculative value, it is apparent that if Congress had intended to reserve minerals the land was not "valuable for," such as coal bed methane, it would have done so expressly. This conclusion is further buttressed by Congress' continued solicitude for entrymen shown by its direction to the Secretary in 1914 to restore full fee title to those who elected to receive limited patents on lands subsequently determined to have insufficiently valuable coal.

Apart from invoking the presumption favoring the government where grants are ambiguous, the court of appeals could only support its conclusion by inferring that Congress' reservation of coal showed an intent to reserve even "indeterminate future value" in the coal. (Pet. App. 30a.) As we have shown at length, however,

history and the statutory text disclose that the court significantly overstated what Congress reserved. The 1909 and 1910 Acts did not reserve all coal on federal lands. Secretary Ballinger's 1909 regulations for the classification of coal lands – of which the Congress was fully aware in enacting the 1910 Act, H.R. REP. NO. 61-377 at 4 (1910) – made it evident that many lands with abundant coal deposits which were too deep for mining in that day were to be classified as "noncoal land." (Pet. App. 137a-139a.) Implementation of those regulations by USGS was expressly based on the view that coal lands were those where "coal can be commercially mined." 34TH ANNUAL REPORT OF THE DIRECTOR, USGS, TO THE SECRETARY OF THE INTERIOR 145-46 (1913). "[I]n determining whether a tract [was or was] not coal land the Department [was] guided by its coal classification regulations as to the workability of a deposit of coal occurring on such tract." *Nelson J. Littlejohn*, 44 Pub. Lands Dec. 48, 52 (1915).

In short, Congress reserved coal only on lands "valuable," 30 U.S.C. § 83, or even "chiefly" valuable for coal. 30 U.S.C. § 81. Congress knew that rights even to known deposits of hardrock coal would continue to pass to patentees under the 1909 and 1910 Acts, because those deposits were not valuable enough to be "chiefly valuable." *See, e.g., Ada I. Hindman*, 42 Pub. Lands Dec. at 329 (granting full patent without coal reservation despite ex parte affidavit from General Land Office "practical miner" that tract contained a "workable deposit" of coal). Congress did *not* follow a policy of reserving rights to coal of merely "indeterminate potential value." (Pet. App. 30a.) History, therefore, undermines the Tenth Circuit's inference that Congress intended to reserve rights to coal

bed methane which, at the time, appeared to lack even potential value.

II. THE PRESUMPTION IN FAVOR OF THE FEDERAL GRANTOR CANNOT BE MEANINGFULLY APPLIED TO DEFEAT HOMESTEADERS' CLAIMS TO COAL BED METHANE.

This Court has often cited the rule of construction that "land grants are construed favorably to the Government, that nothing passes except what is conveyed in clear language, and that if there are doubts they are resolved for the Government, not against it." *Watt v. Western Nuclear, Inc.*, 462 U.S. at 59 (quoting *United States v. Union Pacific R. Co.*, 353 U.S. 112, 116 (1957).) Because this rule is the centerpiece of the court of appeals' decision and of the respondents' arguments, its application must be carefully examined.

The only mineral mentioned in the 1909 and 1910 Acts is "coal." Gold, phosphate, oil, and natural gas, for example, are nowhere mentioned. Yet none contends that these minerals failed to pass to the patentee. Congress' failure to specifically exclude these minerals from the reservation of "coal" does not mean that they were not conveyed "in clear language." Closer to the point is the question of minerals interbedded with coal. If coal and uranium were interbedded in equal portions in lands patented under the Acts, would the reservation of coal alone be considered ambiguous, warranting resort to the presumption to treat uranium as "coal"? Closer still are the question of natural gas generated in strata deeper than the coal bed, but migrating up into it, and the question of natural gas generated in the coal bed, but migrating away from it. Is the term "coal" ambiguous as to one, the other, or both?

Used in isolation, as the court of appeals did here, the rule construing grants in favor of the government does not offer a principled way to answer these questions. Nothing in the long history of this rule of construction suggests it is equipped to handle the present situation in which Congress plainly grants one mineral, plainly reserves another, and is arguably silent about the result when the two are found together.

In American jurisprudence, the origin of the rule is traditionally attributed to the Charles River Bridge case, *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837). There the Court adopted English common law rules of construction of crown grants to determine whether the Commonwealth of Massachusetts had granted an exclusive bridge franchise. Because the corporate charter given to the proprietors of the bridge did not expressly convey an exclusive right, the court refused to imply it because any ambiguity must be construed in favor of the government. *Id.* at 544. *Charles River Bridge* is one among many cases invoking the rule of construction to defeat corporate claims of exemption from governmental powers. *See, e.g., Coosaw Mining Co. v. South Carolina*, 144 U.S. 550 (1892) (power of state to issue competing mining lease); *Minot v. Philadelphia, Wilmington & Baltimore RR Co.*, 85 U.S. 206 (1873) (tax power); *Holyoke Water-Power Co. v. Lyman*, 82 U.S. 500 (1873) (power to regulate fisheries). *Cf. The Binghamton Bridge*, 70 U.S. 51, 74 (1865) (despite rule of construction favoring government, words of grant must be given "liberal and fair construction").

The rule is easily applied in governmental power cases. Either the power is expressly waived, or it is not.

That is not the case here, for all agree that coal bed methane is a natural gas and all agree that (at least to a large extent) rights to natural gas are clearly conveyed by patents under the 1909 and 1910 Acts. Help on applying the rule, if it is to be gained at all, must come from this Court's mineral and land grant cases. Three are the most directly pertinent.

In *United States v. Union Pacific RR Co.*, 353 U.S. 112 (1957), the Court determined that the rule of construction denied the railroad the mineral rights underneath a right-of-way it had received "for the construction of a railroad and telegraph line." *Id.* at 113. The Court placed great weight on the statutory exclusion of "mineral lands" from the grant of adjoining lands to the railroad, finding it incongruous that the statute would exclude those lands but give the railroad "the untold riches underlying the right of way." *Id.* at 116. In contrast, under the 1909 and 1910 Acts Congress was careful not to deny patentees the rights to most minerals, reserving only the "coal" where the deposits were known to be valuable. Stated differently, Congress reserved the "told" riches – the coal; it was the "untold riches" that Congress granted to the patentee.

Andrus v. Charlestone Stone Products Co., Inc., 436 U.S. 604 (1978), draws closer to the problem at hand. There the issue was whether one could "locate" a claim to water under the Mining Law of 1972. That statute permitted claims as to "all valuable mineral deposits. . . . " 30 U.S.C. § 22. The issue was whether water is a "valuable mineral" under the statute. Standing alone, the rule of construction was of no help. The Court assumed that water was a

mineral. *Id.* at 610. Therefore, there was no facial ambiguity in the statute that would allow the Court to resolve doubts in the government's favor: the statute did not expressly mention water, but it did not expressly mention gold either. The Court had to resort to other lines of analysis, looking primarily to a brief history of the separate development of water rights law and of the Mining Law and its predecessors, *id.* at 611-14, and to "practical consequences" that would flow from holding water to be locatable. *Id.* at 614-16. The Court invoked the rule of construction only at the end of its opinion to summarize rather than amplify its conclusion.

Finally, *Watt v. Western Nuclear, Inc.* addressed the question of whether gravel found on lands patented under the Stock-Raising Homestead Act of 1916 was a mineral with the meaning of the statute's reservation of "all coal and other minerals." The majority determined that "mineral" was a term of many meanings; under some gravel was a mineral, under others it was not. 462 U.S. at 43. It also noted that the term had produced inconsistent rulings in cases where the issue concerned gravel. *Id.* at 44-45. If the rule of construction could properly be applied without further consideration of congressional intent, then the Court could have applied it at this point.

Instead, the Court conducted an extensive review of the history and purposes of the SRHA. Finding that Congress understood that the "surface of SRHA lands would be used for ranching and farming," the Court construed the term "minerals" to "include substances that are mineral in character . . . , that can be removed from the soil, . . . and that there is no reason to suppose were intended to be included in the surface estate." *Id.* at 53.

The present case, however, is at the opposite end of the interpretive spectrum from *Watt v. Western Nuclear, Inc.* The crucial difference in the cases is the differing contexts in which the SRHA and the 1909 and 1910 Acts were adopted, as this Court aptly explained. "Unlike the preceding statutes containing mineral reservations, the SRHA was not limited to lands classified as mineral in character, and it did not reserve only specifically identified minerals." *Id.* at 49. Because patents under the 1909 and 1910 Acts plainly included rights to natural gas, there is ample reason to suppose that drilling for natural gas, wherever it might be found, was intended to be included in the surface estate.

In sum, the rule of construction that ambiguities in grants are resolved in the government's favor cannot be applied as a substitute for the other lines of statutory analysis explained at length above. Those other lines, fully complementing the plain meaning of the term "coal," point in favor of the patentee. The only basis on which the respondents may rest their case is that the "practical consequences," *Andrus v. Charlestone Stone Products Co.*, 436 U.S. at 614, of holding for patentees militate against that conclusion, a point to which we now turn.

III. THE EFFECTS OF SEPARATE OWNERSHIP OF COAL AND COAL BED METHANE DO NOT COMPEL A DIFFERENT CONCLUSION.

In opposing Amoco's petition for a writ of certiorari, the United States urged that it was implausible "that Congress intended to give the agricultural patentee a useless commodity that would necessarily be dissipated when the coal owner removed the coal." The government

questioned whether Congress expected the courts to create a body of federal common law to address the incidental taking of a patentee's coal bed methane or require the payment of compensation for its waste. (U.S. Opp. at 27 n.12.)

This Court need not address whether the source of the common law is state or federal, but Congress explicitly contemplated a role for the courts in adjudicating disputes between patentees and coal operators.

> [N]o person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of *all* damages to such owner caused thereby as may be determined by a court of competent jurisdiction.

35 Stat. 844 (codified at 30 U.S.C. § 81) (emphasis added). Damages to other minerals resulting from the coal owner's operations would appear to fall within the broad compensation provision of the 1909 Act.[5]

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[5] A textual comparison suggests Congress intended the compensation provisions in the 1909 Act to apply to more than just surface damage. This is demonstrated by the contrasting compensation provisions of the 1914 Agricultural Entry Act, which this Court construed as limiting compensation to damages for crops and agricultural improvements. *Kenney-Coastal Oil Co. v. Kieffer*, 277 U.S. 488, 505 (1928). The 1914 statute authorized qualified persons to enter lands containing reserved mineral deposits to prospect for such minerals upon the posting of a bond "as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting." 38 Stat. 509 (codified at 30 U.S.C. § 122). The 1910 Act's damages provision is essentially identical to that construed in *Kenney-Coastal*, 30 U.S.C. § 85, but broader language is used in the 1909 Act for mining and removal activities. 30 U.S.C. § 81.

It is unnecessary to address at this time whether a coal operator would owe the patentee damages for venting coal bed methane from a mine when the methane was worthless, or whether even valuable methane could be vented as a necessary incident of coal mining operations. What is clear is that Congress left these issues to courts of competent jurisdiction to resolve, and anxiety over how those questions might be answered has no bearing on the proper interpretation of the term "coal."

While it is certainly possible to produce coal bed methane without mining the coal, the government's point is that it is not possible to mine coal without releasing coal bed methane. This circumstance, however, has not prevented Congress from dividing rights to minerals. In an analogous situation, Congress has reserved the "ownership of and the right to extract helium" from all gas produced under federal onshore and offshore oil and gas leases. 30 U.S.C. § 181 (Mineral Leasing Act); 43 U.S.C. § 1341(f) (Outer Continental Shelf Lands Act). "Natural gas" is a commingling of hydrocarbons, such as methane, and nonhydrocarbons, such as helium. *Northern Natural Gas Co. v. Grounds*, 441 F.2d 704, 708 (10th Cir. 1971). When natural gas is extracted from the reservoir, it contains all of its constituent elements, including helium. *Id.* The federal lessee cannot produce natural gas without producing the helium belonging to the United States. The solution to this apparent dilemma has been covered by regulation for years. At the United States' election, the lessee may be required to deliver the helium-containing gas to a processing plant for extraction. *See* 30 C.F.R. § 256.11. Yet under the government's logic, this circumstance would be a ground for barring the severance of the helium from the methane. That Congress is unimpressed

by this logic is ample reason for the Court to reject it as well.

The respondent Southern Ute Tribe has offered a similar prudential concern. In its opposition, the Tribe argued that Congress could not have intended to give patentees dominion and control over a substance that cannot be extracted without destroying the coal. (Southern Ute Opp. at 25.) Strictly speaking, the coal is not "destroyed" in the sense that it has no value as a result of coal bed methane extraction. Indeed, the Tribe's expert testimony indicates that the harm, if any, is contingent upon a coal lessee being actively engaged in mining operations.

> Coal miners normally consider fractures of the coal seam or adjacent structures to have a negative impact on coal production. A fractured roof, floor and/or seam generally translates into additional operating costs, loss of productivity and increased safety hazards in coal mining. In addition, the introduction of substances (i.e., gels, sands, etc.) into a coal seam to be mined creates problems for the coal producer who is concerned about the quality of the product.

(J.A., Vol. I at 324.) Whether the coal is in fact damaged by coal bed methane extraction is a matter of dispute.

As a practical matter however, the real issue is not whether Amoco's interpretation of "coal" will allow the coal seam to be damaged but rather who is entitled to inflict that damage. Many coal operators also produce the coal bed methane from the non-federal seams they mine, as observed by another of the Tribe's experts:

> Coal seam gas production has been successfully undertaken in association with active mining operations (before, during, and after mining), as

> well as in "virgin" coal seams where no active mining has yet taken place. It is the goal of coal seam degasification projects to produce gas at rates and volumes that render it economically competitive with other sources of natural gas. When done as part of an active mining operation, this process reduces the waste of hydrocarbon gases that would normally be liberated during mining.

(J.A., Vol. I at 350.)

As for congressional intent in 1909 and 1910, split estate mineral development was common, and it was known that production by one mineral owner might harm the mineral he did not own.[6] As early as 1893, the Supreme Court of Pennsylvania determined that an oil and gas lessee had the right to drill through the coal estate of another though he might be liable to the coal owner for damages. *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Penn. 1893). In that case the surface owner did not expressly reserve any rights to conduct oil and gas operations through the coal seam when he conveyed the coal estate. Years later, he entered leases for the oil and gas underlying the coal. Seeking to accommodate the rights of both mineral owners, the court denied the coal owner's request for an injunction and held that

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[6] *See, e.g., South Penn Coal Co. v. Smith*, 60 S.E. 593 (W. Va. 1908) (deed conveying coal reserved to grantor right to drill for oil and gas); *Chambers v. Smith*, 38 A. 522 (Pa. 1897) (same); *Rend v. Venture Oil Co.*, 48 F. 248 (W.D. Penn. 1891) (court refused to grant injunction where coal owner alleged drilling for oil and gas would interfere with removal of the coal). The concurring judge in *Chartiers Block Coal Co. v. Mellon*, 25 A. 597 (Penn. 1893), discussed in the text, observed that of 60,000 existing oil wells in Pennsylvania, half were drilled through workable coal seams. (*Id.* at 601 (concurring opinion).)

> [t]he owner of the coal must so enjoy his own rights as not to interfere with the lawful exercise of the rights of others who may own the estate, either above or below him. The right of the surface owner to reach his estate below the coal exists at all times. The exercise of it may be more difficult at some times than at others, and attended with both trouble and expense.

Id. at 599.

Finally, neither the Department of the Interior nor the Tenth Circuit considered damage to the coal seam germane to the question of rights to coal bed methane. In the 1990 Solicitor's opinion, the Department recognized that "[c]oalbed gas extraction techniques may, in some cases, damage the coal seam and render the coal unminable or more expensive to mine. . . . " (Pet. App. 175a.) Notwithstanding this observation, the Solicitor concluded that a lessee under a conventional oil and gas lease was entitled to extract methane from the coalbeds located on its lease. (*Id.* at 167a.) The Tenth Circuit did not disagree, but instead "accept[ed] that an oil and gas lease executed by the owner of CBM [coal bed methane], in the absence of a specific reservation of CBM, could be an effective instrument to convey the right to drill and produce CBM." (Pet. App. 79a-80a n.19.)

In sum, the severance of rights to coal bed methane from rights to the coal create no greater practical difficulties than those Congress was already aware of in 1909 from the practice of severing rights to coal from rights to oil and gas.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A – IDENTIFICATION OF INTERESTED PARTIES

The members of the Coal Bed Methane Ad Hoc Committee are as follows:

Karen Kennedy, Chairman (WIPA)
Barrett Resources, Inc. (Joe Barrett)
John Daly
Devon Energy Corporation (Gary McGee)
JoAnn Homer
Independent Petroleum Association of America (Ben Dillon)
Jolen Operating Company (David Fleischaker)
Bryon Oedekoven
Fred Oedekoven
Joel Ohman
Jack Overstreet
Penneco Resources
Petroleum Association of Wyoming (Rick Robitaille)
Prima Oil and Gas Company (Walter Lunsford)
Redstone Resources, Inc. (Mike Caskey)
Hap Stuart
Tom Throne
Western Gas Resources, Inc. (Krista Mutch)
Wyoming State Senator Steve Youngbauer

Persons or companies financially supporting the Coal Bed Methane Ad Hoc Committee are as follows:

Thomas Barlow
Bear Paw Energy
Ray Broyles
Nancy Butcher
Wilma Carter
Chandler & Associates
Citation Oil & Gas
CMS Oil & Gas Company

Colorado Interstate Gas Company
Ola Criffield
Dossett & Dossett
Duncan Energy Company
Farleigh Oil Properties, Inc.
First Interstate Bank, Gillette, WY
C.F. Goddwin
Mark Haight
Dean Hall
Bud Hayden
Independent Production Company
J.N. Exploration
Mary Keeney
Kennedy Oil Company
Sandra Lange
Lynde Trust
L.Y. Ranch
Mad House, Inc.
Louis McBeth
Jack McCartney
Jerry Moore
Mildred Parnell
Nancy Parnell
Penneco
Petroglyph Operating Company
Frances Putnam
Rawhide Resources
RIM Operating Company
Larry Stuart
Jerry Taylor
David Tate
Torch Energy
Yates Petroleum Corporation